

**PUBLIC EMPLOYMENT RELATIONS BOARD  
FOR THE STATE OF DELAWARE**

<b>TEAMSTERS LOCAL UNION NO. 326,</b>	)	
Petitioner,	)	<b><u>ULP No. 05-02-470</u></b>
	)	
<b>CITY OF REHOBOTH BEACH, DELAWARE,</b>	)	
Respondent.	)	

*Appearances*

*Hugh J. Beins, Esq., Beins, Axelrod, Kraft, Gleason & Gibson, for Teamsters Local Union 326  
David H. Williams, Esq., Morris, James, Hitchens & Williams, for the City of Rehoboth*

**BACKGROUND**

Charging Party, Teamsters Local Union No. 326 (“Teamsters”), is an employee organization which has as a purpose the representation of police officers in collective bargaining, pursuant to §1602(g) of the Police Officers’ and Firefighters’ Employment Relations Act (“POFERA”), 19 Del.C. Chapter 16. The Teamsters represent a bargaining unit of full-time Rehoboth Police Officers at and below the rank of Sergeant (as defined in Rep. Pet. 96-10-198) and is certified as the exclusive bargaining representative of that bargaining unit. 19 Del.C. §1602(h).

The Respondent, City of Rehoboth Beach, Delaware (“City”) is a public employer within the meaning of 19 Del.C. §1602(l).

On or about February 24, 2005, Teamsters filed an unfair labor practice charge alleging the City violated 19 Del.C. §1607(a)(1) and (a)(5), which provide:

(a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

(1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.

(5) Refuse to collectively bargain in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.

The Charge alleges that the City unilaterally breached its oral agreement with Local No. 326 to promote the new Corporals, provide them their stripes and back pay retroactive to April 1, 2004. The City of Rehoboth filed its Answer to the Charge on or about March 9, 2005, in which it denied the allegations of the Charge, requested that it be dismissed and that the Union be required to pay reasonable counsel fees and costs. The City's Answer did not include new matter.

The Charge alleges the City unilaterally breached its oral agreement with Teamsters Local Union No. 326 to promote new Corporals with back pay retroactive to April 1, 2004.

The City filed its Answer to the Charge on or about March 9, 2005, in which it denied the allegations and requested the Charge be dismissed. The City's Answer did not include new matter.

A Probable Cause Determination was issued on April 14, 2005. The parties were provided with an opportunity to place their evidence and argument on the record during the hearing conducted on May 23, 2005, and through the filing of single simultaneous written closings on June 10, 2005.

This decision results from the record thus created by the parties.

### **FACTS**

The Teamsters and the City were parties to a collective bargaining agreement which expired on March 31, 2004 and are currently covered by a successor agreement which term extends from April 1, 2004 through March 31, 2007. The current agreement was accepted by the

Teamsters' membership on December 28, 2004. There is no dispute that the new agreement was applied retroactively to April 1, 2004 and that bargaining unit officers receive retroactive wage increases based upon their rank and time in grade as of April 1, 2004.

During the course of the negotiations for the 2004-2007 agreement, the City and the Teamsters entered into a Memorandum of Understanding ("MOU") which provided:

### **MEMORANDUM OF UNDERSTANDING**

The City of Rehoboth Beach and Teamsters Local Union No. 326 agree that the scores of the 3 employees who unsuccessfully tested for Corporal in October, 2003 shall be recalculated in the manner set forth in revised Article 10 upon ratification of a successor Agreement. If the recalculation results in a passing score of 70, such employees shall be promoted to Corporal, without back pay, effective upon ratification of the Agreement. [Joint Exhibit 3]

The MOU was signed by Greg Ferrese, Rehoboth Beach City Manager, and Michael S. Ciabattoni, Vice President, Teamsters Local Union No. 326 on March 30 and was not subject to ratification by either party.

The parties continued to negotiate after March 30, and in December, 2004, the Teamsters agreed to place the City's settlement offer before its membership for a vote. Vice President Ciabattoni told the membership prior to the voting that the MOU would allow three PFC's to advance to Corporal without retesting based upon the negotiated changes to the promotional standards. He explicitly stated to the membership that the MOU was not part of the contract.

The Teamsters' membership unanimously voted to accept the City's settlement offer on the morning of December 28, 2004. At some point shortly thereafter, the City Council also voted to accept the agreement.

The 2004-2007 Agreement included changes to Article 10, Promotional Opportunities, which made Patrolman First Class ("PFC") officers eligible for promotion to Corporal after four years of service and modified the weighting of the components in the composite score which is

used to rank officers on the promotional list. These changes, in conjunction with the MOU, resulted in three PFC Officers being promoted to Corporal on or about January 18, 2005, based upon scores they received in October 2003.

On December 27, 2004, Teamsters' Vice President Ciabattone contacted Teamsters' Shop Steward Kevin Jones during working hours at the Police Station and asked Jones to try to locate City Manager Ferrese. Jones went to the City Manager's office where he was advised the City Manager was on vacation and would not be in the office on either December 27 or December 28.

Shop Steward Jones returned Vice President Ciabattone's telephone call, relayed the message and provided Ciabattone with the City Manager's home phone number. On the morning of December 28, prior to the scheduled vote on the City's offer, Ciabattone called Ferrese at home and suggested that the parties agree to make the salaries of the three PFC's who would be promoted to Corporal retroactive to April 1, 2004. Ciabattone suggested that this would be good for morale. The City Manager responded that he did not have a personal objection to making the salaries retroactive but said he would need to check with the City's labor attorney. Ferrese told Ciabattone he would call him when he returned to the office and after he spoke with counsel. Ciabattone and Ferrese again spoke later in the day concerning the successful vote and conclusion of the negotiations by the Teamsters' acceptance of the City's settlement offer.

On December 30, 2004, City Manager Ferrese telephoned Vice President Ciabattone to advise that the proposed retroactive wages for the new Corporals did not cause a problem for the City's labor counsel. Ciabattone then called Shop Stewards Kevin Jones and Paul Parsons<sup>1</sup> to advise them that the three new Corporals (which included Jones) would be receiving increases due to their promotion retroactive to April 1, 2004.

---

<sup>1</sup> Both Shop Stewards Parsons and Jones were members of the Teamsters Local No. 326 bargaining committee, on which Vice President Ciabattone served as the Chief Spokesperson.

On or about January 6, 2005, an employee of the City's Payroll Department contacted City Police Chief Banks and asked about the three new Corporals for purposes of computing their retroactive back pay to April 1, 2004. The Chief, who had been part of the City's negotiating team, questioned why she needed information on the new Corporals as they were not included in the retroactivity agreement per the March 30, 2004, MOU. The clerk stated she had no knowledge of the MOU and Banks provided a copy at her request. The clerk indicated she would need to discuss the MOU with the City Manager.

On the afternoon of January 6, 2005, City Manager Ferrese faxed a copy of the MOU to the City's Labor Counsel with a handwritten note, "Call me on this." [Union Exhibit 2] A copy of this fax was appended to a memo which the City Manager placed in Shop Steward Paul Parsons's mailbox on January 7, 2005:

TO: Paul Parsons  
FROM: G. Ferrese  
date: 1-7-05

The Memorandum of Understanding states without back pay.

I forgot this existed, and I think that you and Mike did to [*sic*].

Anyway, now what!

Shop Steward Parsons and City Manager Ferrese discussed the impact of the Memorandum of Understanding on back pay for the new Corporals in Ferrese's office on January 7, 2005. Ferrese told Parsons that he had discussed the impact of the MOU with counsel, and that the City's hands were tied by the written agreement. Parsons told Ferrese he would call Vice President Ciabattoni.

On or about January 10, Vice President Ciabattoni called City Manager Ferrese to express the Teamster's discontent. He clearly indicated to Ferrese that the Teamsters had not forgotten the MOU.

By letter dated January 10, 2005, the City's Counsel communicated the City's position directly to Vice President Ciabattoni:

I spoke to Greg Ferrese concerning back pay for the 3 employees who unsuccessfully tested for corporal in October 2003. When you asked Greg Ferrese whether he was willing to provide back pay to such individuals, he forgot that the parties signed a Memorandum of Understanding on March 30, 2004 ("the Memorandum of Understanding"). By the same token, when Greg initially spoke to me following your phone call, I had no recollection of the Memorandum of Understanding.

Based upon a review of the Memorandum of Understanding, the City's position is that the parties have a clear and unequivocal understanding which the City will honor. Namely, the parties agree that the promotions to corporal will be "without back pay, effective upon ratification of the Agreement." The Memorandum of Understanding was not a tentative agreement, rather is *[sic]* was the final agreement of the parties on this issue.

The position the City is taking on this issue is no different than the position we would expect the Union to take under similar circumstances. [Joint Exhibit 4]

### **ISSUE**

WHETHER THE CITY OF REHOBOTH VIOLATED §1607 (A)(1) AND (A)(5) OF THE POLICE OFFICERS' AND FIREFIGHTERS' EMPLOYMENT RELATIONS ACT BY NOT PROVIDING BACK PAY TO POLICE OFFICERS WHO WERE PROMOTED TO CORPORAL BY OPERATION OF A NEW COLLECTIVE BARGAINING AGREEMENT?

### **POSITIONS OF THE PARTIES**

#### **Teamsters Local No. 326:**

The Teamsters argue that the oral agreement reached between City Manager Ferrese and Vice President Ciabattoni on December 30, 2004, was binding and modified the March 30 Memorandum of Understanding. Consequently, the three new corporals should receive their stripes and wage increase retroactive to April 1, 2004. The Teamsters offer NLRB precedent to

support its argument that the City's action represents a unilateral change in violation of the duty to bargain in good faith.

City of Rehoboth:

The City argues the issue raised by this charge is whether the parties verbally and legally modified the written agreement memorialized in the March 30, 2004, MOU by the telephone conversations between Teamsters Vice President Ciabattoni and City Manager Ferrese on December 28 and December 30, 2004. Citing Reeder v. Sanford School (397 A. 2d 139, 141 (Del. Super., 1979)), the City asserts there must be mutuality of assent and that,

. . . an oral agreement changing the terms of a written contract must be of such specificity and directness as to leave no doubt of the intention of the parties to change what they previously solemnized by formal document. Reeder, (Supra., 142).

The City asserts the Teamsters failed to establish there was a clear and unambiguous discussion of the alleged modification of the terms of the MOU.

Because the Teamsters have not satisfied their burden of establishing that the written agreement contained in the MOU was verbally modified by the parties, there is no basis for concluding that the City violated its duty to bargain in good faith or committed an unfair labor practice as alleged.

**OPINION**

The Teamsters charge that the City has unilaterally altered a mandatory subject of bargaining in violation of its duty to bargain in good faith and has also interfered with the rights of its organized employees in violation of 19 Del.C. §1607 (a)(1) and (a)(5). Although the Teamsters have offered arbitral decisions in support of their claim, this charge does not involve a

question of contractual interpretation or application subject to resolution through the parties' contractual grievance and arbitration procedures.

The Teamsters assert that the status quo which the City has violated was not established by the written Memorandum of Understanding the parties executed on March 30, 2004, during the course of their negotiations, or by the collective bargaining agreement that had been accepted by the Teamsters membership just two days prior. It is undisputed that the subject of this dispute, namely the promotion of three Patrolmen First Class officers to the rank of Corporal based on the new promotional criteria without retesting, is not addressed in the 2004-2007 collective bargaining agreement.

The burden of the Charging Party in sustaining a charge that the Respondent has failed to bargain in good faith by effectuating a unilateral change in a mandatory subject of bargaining was established in the earliest decisions issued by the Delaware Public Employment Relations Board. Appoquinimink Education Assn. v Bd. of Education, Del.PERB, ULP 1-2-84A, I PERB 23, 26 (1984), adopting NLRB v. Katz, U.S., 369 US 736 (1962). The critical question in determining whether a unilateral change was made is establishing the status quo which is alleged to have been modified. Christina Education Association, Inc., v. Bd. of Education, Del.PERB, ULP 88-09-026, I PERB 359, 366 (1988); Local 1590, IAFF v. City of Wilmington, Del.PERB, ULP 89-05-037, I PERB 413, 422 (1989).

The March 30, 2004 MOU is clear and unambiguous. There is no dispute that it was a final agreement, reached during the course of the negotiations, which allowed the parties to move on to other issues. The MOU was a precedent to later tentative agreements which ultimately resulted in the City's settlement offer. The retroactive increase for the new Corporals was not part of the City's settlement offer.



The Teamsters cite the decision of Arbitrator Warren Eagle in Re: Roadway Express, Inc., 105 LA 114, 116 (1995), to support its position that “parties to a written contract may, however, alter or modify its terms by a subsequent oral agreement . . . provided that the oral modification conforms to principles of law relating to the execution of valid contracts.” Although this Board is not bound by arbitration decisions interpreting specific contracts, such decisions can provide sound reasoning and logic which may provide guidance. The decision in Roadway however is clearly distinguishable from the present matter. In reaching his decision, the arbitrator specifically noted, “. . . no argument was raised as to the specificity in the terms of the instant oral agreement or the absence of mutual acceptance of those terms by the parties.”

That is specifically the basis on which the City contests the Teamsters premise that the MOU was effectively modified by conversations between Ferrese and Ciabattone on December 28 and December 30, 2004. The City argues those conversations lack both the specificity and directness required by Delaware law to evidence the mutual intent of the parties “to change what they had previously solemnized by formal document.” Reeder, (Supra.)

Having carefully reviewed the testimony and documentation placed on the record, I am convinced that neither the City Manager nor the City’s labor counsel recalled the exact provisions of the Memorandum of Understanding when the Teamsters proposed that the promotional wage increases be made retroactive to three new Corporals. The particulars of the last sentence of the MOU concerning the back pay and effective date of the promotions were clearly not considered nor specifically discussed. Consequently, the oral agreement of December 30, 2004, lacks the requisite mutual assent.

The ultimate question raised by this charge is whether the City violated its duty to bargain in good faith. On the record before me, I cannot conclude that it did. The parties agree the MOU was extra-contractual. It was not part of the City’s settlement offer and the Teamsters

made the membership aware of that prior to the vote. The agreement reached between the City Manager and the Teamsters Vice President after the membership's acceptance of the City's settlement offer did not result from the collective bargaining process nor did it alter the status quo that existed concerning the new Corporals.

The Teamsters have also contested the issue of the "awarding of stripes" which testimony established means the date upon which a promotion is effective. The testimony was consistent that the "awarding of stripes" was not specifically discussed during the December, 2004 and January, 2005, conversations. Both City Manager Ferrese and Vice President Ciabattoni testified that "stripes" were dealt with in the Memorandum of Understanding. Vice President Ciabattoni testified that his recollection was that stripes were not an issue because the parties had agreed they were retroactive to April 1, 2004. The MOU is clear, unambiguous, and speaks for itself, ". . . [i]f the recalculation results in a passing score of 70, such employees shall be promoted to Corporal, without back pay, effective upon ratification of the Agreement."

While an unfortunate misunderstanding, the complained of incident just does not rise to the level of an unfair labor practice.

### **DECISION**

After a complete review of the record and arguments of the parties, including all cases cited in support of their respective positions, it is determined that:

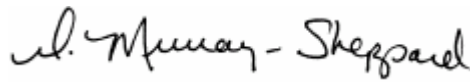
1. The City of Rehoboth Beach, Delaware, did not interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under the Police Officers' and Firefighters' Employment Relations Act, or engage in conduct in violation of 19 Del.C. §1307(a)(1).

2. The City of Rehoboth Beach, Delaware, did not refuse to bargain collective in good faith with Teamsters Local Union No. 326 or engage in conduct in violation of 19 Del.C. §1307(a)(5).

**WHEREFORE**, this Charge is hereby dismissed

**IT IS SO ORDERED.**

DATE: 22 July 2005

A handwritten signature in cursive script, reading "D. Murray-Sheppard", written in black ink on a white background.

DEBORAH L. MURRAY-SHEPPARD  
Hearing Officer  
Del. Public Employment Relations Bd.